

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-2448

ORIGINAL

To be argued by
LOUIS A. GARCIA

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PFS

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee.

- against -

MANUEL LE CLERES, a/k/a PAITO,

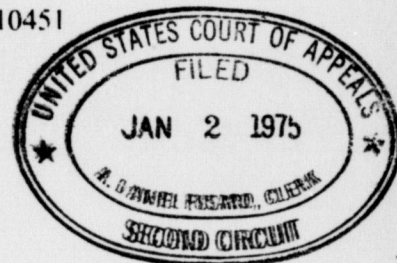
Appellant.

APPELLANT'S BRIEF

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-----X
UNITED STATES OF AMERICA, :
 :
 APPELLEE, :
 :
 - against - : Docket No. 74-2448
 :
 MANUEL LECLERES, a/k/a PAITO, :
 :
 APPELLANT. :
-----X

PRELIMINARY STATEMENT

Appellant LeCleres was sentenced to serve a four-year term on each count, said sentences to run concurrently. He was also fined \$5,000.

Whether the admission of co-defendant's Grand Jury testimony at trial deprived Appellant LeCleres of his constitutional right of confrontation.

STATEMENT OF FACTS

On September 19, 1974, Appellant LeCleres, a/k/a "Paito", and three co-defendants proceeded to trial before the Hon. John M. Cannella on an indictment charging them with conspiracy in that from January 1, 1972 to March 29, 1974 they conspired to steal or would cause to be stolen motor vehicles in states other than New York and would transport said motor vehicles in interstate commerce into the State of New York. As part of said conspiracy, it was further charged that after altering the appearance of the automobiles or obliterating the confidential vehicle identification numbers of said autos, the defendants would sell or otherwise dispose of these vehicles. Appellant LeCleres was also charged with four separate counts of transporting in interstate commerce a motor vehicle knowing the same to have been stolen in violation of Title 18 U.S.C. Section 2312 and four counts of concealing or selling a motor vehicle knowing the same to have been stolen in violation of Title 18 U.S.C. Section 2312.*

Four witnesses were presented by the Government who testified that their cars had been stolen.

RAMON HERNANDEZ lived in Bridgeport, Connecticut on November 18, 1972 and at that time owned a blue 1964 Cadillac which had Connecticut license plates. (95)** He next saw his car which was then painted red and grey in the Whitestone Pound

*The indictment is set out in its entirety in the Appendix, A.5-10.

**Numerical references are to the pages of the trial transcript.

in Queens with Officer Torrens on March 16, 1973. A receipt with the words "Schweitzer Hardware Inc., Electrical Supplies, 1228 Main Street, Bridgeport, Connecticut" had been found in the car by Patrolman Torren and Mr. Hernandez verified that he had in fact brought some plumbing at this store. (100)

On December 30, 1972, WALTER DONALD SWAIN resided in South Norwalk, Connecticut and owned a 1957 white Ford Thunderbird which had been registered in the State of California under his name. (82-83) On December 30, 1972 his car was stolen from a parking area adjacent to the Stamford Connecticut railway station. (85) Thereafter, on August 30, 1973 he again saw his car in the Whitestone Pound when he was brought there by a special agent. (86,87) His credit card receipts with his signature and credit card numbers had been found under the seat of the car. (87)

On March 14, 1972, NUNZIO J. CELONA was living with his in-laws in East Boston, Massachusetts and owned a 1971 Dodge Dart Swinger which was registered in his name in Massachusetts. On that date, his car was stolen from in front of 88 Faywood Avenue in East Boston. A cost center pamphlet which he had left in the car was later found by the Agents. (167-68, 171)

A stipulation was then entered among the parties that RONALD LESLIE was the owner of a 1967 Mercury Cougar which was stolen in Bridgeport, Connecticut on February 6, 1973. This car had been registered in Connecticut. (175)

NORBERTO RAMOS testified that he knew Appellant LeCleres who was also known by the name of Paito. (240) He first met Paito between May and June of 1972 at his sister's home in Connecticut when he got out of the city jail where he had been serving ten

months for "fighting". (242) Louis Gonzales, his sister's common-law husband, was the one who had introduced him to Paito. (242-43)

Paito told him that they could make good money stealing cars but Ramos at first refused since he had just gotten out of jail. (242) However, a few weeks later he again saw Paito at his sister's house. (245-46) Paito at this time explained that he had several people working for him who would steal cars. He would then change the serial numbers on these stolen cars and sell them. (246) Ramos at that point agreed to participate in this enterprise.

He thereafter met Defendant Matos, Juanito Perez, and "Cato" who were also working for Paito. (248) When he stole a car in Connecticut, he would bring it to the R&R Auto Repair Shop on Wales Street in New York and deliver it to Paito. (254-56) At the garage, he met Defendant Garcia whom he knew as "Ralphie". He also saw the Defendant Baez at the garage. (254)

From the summer of 1972 to February of 1973, he stole several hundred cars for Paito. (260) Paito would give him instructions as to what kind of car to steal such as the year and model. (262, 265) Occasionally, he would steal cars with Paito, Perez, Gonzales and Matos. (263) Ramos also stated that on several occasions he took cars to the P&P Garage on Melrose Avenue. (276) There he saw the Defendant Ortas. Most of the time, however, the cars were taken to the R&R Garage. No one other than Paito paid him but Defendants Garcia and Ortas were present when he was paid. (285)

After he arrived at either the R&R Garage or the P&P Garage, he and Paito would remove the Connecticut plates from the stolen cars and put New York plates on these cars. (301)

Once in November of 1972, he delivered a Cadillac to the R&R Garage which was not to be sold but was to be used only for parts. (327) When he brought the car from Connecticut to New York, he turned it over to Paito. (324) Paito, in response to his question, told him that they had a white Cadillac that was parked in the R&R Garage and that they were going to use the fenders and the parts from the stolen car to repair the other car which was legally brought. (328)

The last car which he delivered from Connecticut to New York was a 1967 green Mercury Cougar. (338) Paito had asked him to get such a car and he got the car from Milford, Connecticut when a young lady left the car to go into a bowling alley there. (338) He then met Paito at the R&R Garage and Paito told him to deliver the car to Rafael Matos. (338-39)

Ramos admitted that because he was a witness in this case, he was not going to be prosecuted for any of the car thefts. Additionally, he had been convicted of at least five felonies. (358)

RAFAEL MATOS testified that he had lived across the street from the R&R Garage. (569) At this time, Defendant Ortas owned the garage but he observed Defendant Garcia and Defendant Baez working there. (574-75) When Defendant Ortas left the garage, Baez and Garcia took over its operation. According to Matos, he later met Paito and observed Paito bringing cars to the garage to

be fixed. (580) He asked Paito if he needed another driver as he was out of work, and Paito thereafter agreed to give him a job. (581) He would then go to Connecticut with two other men to look for cars in parking lots. (592) On their return trip, they would always stop at the R&R Garage. (596) Paito would pay him \$50 a trip. (597-98)

Finally, this witness testified that on two or three occasions he observed Paito removing the vehicle identification numbers from the cars. (630)

JUAN PEREZ, 23 years of age, testified that he knew Paito, Defendants Garcia, Baez and Ortas. He later met Paito at the R&R Garage where he worked as a mechanic. Paito asked him if he wanted to go to Connecticut with him which he agreed to do. On Route 95 near Bridgeport, Connecticut, Paito told him to wait there in his car. Shortly thereafter, Paito returned with another car and directed Perez to drive it to Wales Avenue.

In the space of a year, he went to Connecticut with Paito about five to six different times and also went alone to Paito's friend's house to await the delivery of a car. (744)

MIRIAM RIVERA, a resident of New York City, testified that on April 14, 1972 she bought a 1971 two-door gold and dark brown Dodge Swinger from Defendant Garcia at the R&R Garage. (114) Defendant Garcia personally showed her the Dodge which was inside the garage and she thereafter paid him a total of \$1,500. (135) On April 17, 1973 she turned the car into the police. (140)

Special Agents and police officers then testified to various searches of both the R&R Garage and the P&P Garage.

Special Agents JEFFREY HALL and BANTEL went to the P&P Auto Repair Shop on Relrose Avenue on March 8, 1973 and took photographs of a red over grey 1964 Cadillac which was parked in front of the shop. At this time, the Cadillac had New York license plates. (50-55)

On March 15, 1973, PATROLMAN JAMES TORREN seized this 1964 Cadillac from the Defendant Ortas which was in front of the P&P Auto shop. (63-64) His inspection of the car revealed that the vehicle identification number which was stamped into the frame of the vehicle appeared to be "overstamped" above another number. (65) The Officer explained that the VIN have been used by manufacturers since 1954 to identify their cars and car lines and to provide a true identity of the vehicle to which it is attached. (65) "Overstamped", according to this Officer, meant that there had been another number on the frame and a different number had been stamped over it. The original number on the Cadillac could not be ascertained but the "overstamped" number was visible. (66)

On April 17, 1973, PATROLMAN PATRICK PURCELL seized a 1967 Mercury Cougar from the R&R Garage which was in the possession of one Angel Villaneuva. (544) At that time Rafael Matos was the registered owner. (544) The Officer discovered that the vehicle had an altered VIN and the true VIN had been reported stolen. (545)

On August 13, 1973, SPECIAL AGENT HUTTON, PATROLMAN PURCELL, and SPECIAL AGENT BANTEL participated in a search of the R&R Garage. Two confidential vehicle identification plates were found in a brick wall and a bag of rivets was found in a drainpipe. (502, 515) They also seized a 1957 Ford Thunderbird and discovered

that the VIN had been altered and that it was a stolen car. (558)
In the office of the garage, a book and a rivet affixer were found on top of a desk. (806, 815)

Thereafter, on October 4, 1973, Agent Bantel met Appellant LeCleres and seized a card from his person which had his name printed on it and the back of this card had the notation "Raffy Matos- Casa- 731-9635". (847)

Over the objection of all counsel, Defendant Garcia's grand jury testimony was offered by the Government only as against Garcia. (715-16)

Before the Grand Jury, Defendant Garcia had testified that he had an auto repair shop on Wales Avenue where he did both body work and paint jobs on cars. (71) He denied selling Miriam Rivera a car in 1971. (720) He stated that he had a problem with her since she thought that he had sold her a car but she had confused him with someone else. (720) He did not accept any money from her and would have remembered if he had. He did see a man sell her a car from the parking lot next door but this man did not work at this garage and could not be found. It was with this man that Ms. Rivera had been confused. (721-22)

Only Appellant LeCleres took the stand in his behalf. LeCleres who is also known as Paito, testified that he is married, the father of two children, and had never been convicted of any crime. (984-985)

He first met Juan Perez in the summer of 1972 and Ramos in August of 1972. Perez had introduced him to Ramos in front of his house on Cortland Avenue. (986) He met Matos in November of 1972 at his job at Casear's Auto Glass Co. where he would put

windshields on cars. (987) Matos had asked if he could fix a 1967 Cougar that he had. (987) However, Appellant LeCleres responded that he could not because he worked Monday through Saturday and would spend Sundays with his family. (987) Matos said he would give him his phone number and thus wrote it on the back of a card which LeCleres had given him. (988) He never fixed a 1967 Mercury, nor did he ever change the VIN on a 1967 Mercury, nor did Matos ever bring him such a car. (988)

LeCleres also denied paying Ramos money to steal cars for him nor did Ramos steal cars for him. These men offered to sell him cars but he never accepted their offers. (991) Specifically, Ramos offered him a 1963 Cadillac for \$50 in October of 1972.

(991) Ramos had explained that he had brought the cars from old people in Connecticut. (992) He did not buy this car because it was not registered in Ramos' name and Perez had also alerted him to the fact that Ramos was stealing cars in Connecticut. (992) Ramos also tried to sell him marijuana.

Appellant LeCleres stated that he never accepted a 1964 Cadillac from Ramos or altered its VIN; he never accepted a 1967 Mercury Cougar or altered its VIN; and he never accepted a 1957 Ford Thunderbird or altered its VIN. (993-94)

Appellant LeCleres maintained that he met Defendant Baez in the beginning of the summer of 1972 at the R&R Garage when he brought his 1967 Corvette there for an estimate on a body and paint job. (1018) He never met Defendant Garcia but saw him at the garage when he picked up his car. (1019) He denied knowing Defendant Ortas and stated that although he had seen him, he had

never spoken with him. (1022) Defendant Ortas had gone to his place of employment to have a new windshield put on his Maverick. (1024)

HEARING TO SUPPRESS DEFENDANT GARCIA'S GRAND JURY TESTIMONY

On May 16, 1974, a hearing was held prior to trial pursuant to Defendant Garcia's motion to suppress his Grand Jury testimony.

At the outset of this hearing, it was stipulated between the parties that Defendant Garcia was called as a witness before the Grand Jury on March 27, 1974 and that he was the target or one of the targets of that Grand Jury investigation; that he was assisted by an interpreter while he was questioned by Assistant United States Attorney, Mr. Buchwald; that he had another attorney present by the name of Ronald Gardner who stood outside of the Grand Jury room; and that when he was before the Grand Jury, he was asked certain questions and gave certain answers. (H.3)*

The Grand Jury minutes established that in response to questions by the Government, Defendant Garcia first stated "I have something here that my attorney gave me. He told me not to answer any questions that might incriminate me.". Mr. Buchwald in turn responded, "Well, let me warn you of your rights, and if you want to speak we will talk later on". (H.4, A.16)

The third page of the Grand Jury minutes reflects that Defendant Garcia stated again that his attorney told him not to

*Numerical references preceded by "H" refer to the pages of the Suppression Hearing dated May 16, 1974.

answer questions if the questions might incriminate him. The Government, however, continued to ask questions and Defendant Garcia answered the questions through an interpreter. (H.5, A. 17)

On page 6 of the minutes, Defendant Garcia was asked, "Do you know a Mr. Pedro Ortas?" Defendant Garcia responded "With my attorney's advice I would like to answer, I would like please for you to read this." Whereupon he handed Mr. Buchwald a piece of paper and Mr. Buchwald replied "Might the record reflect that the witness has handed me a small piece of white paper -- and to the interpreter -- to be read."

The interpreter stated, "It says give your name and your address and then tell him that with advice of counsel you are not going to answer that question because should you answer it, it would accuse you of a crime." (H.5, A. 19)

Defendant Garcia's counsel argued that from that point on the United States Attorney's office was on notice that Garcia was invoking his Fifth Amendment privilege and that all questioning should have ceased. (H.5) Counsel further pointed out that although Defendant Garcia continued to answer questions, he did not knowingly waive his Fifth Amendment rights. (H.6)

The Government rested on the record. (H.7)

In a written decision filed June 12, 1974 the court denied Defendant Garcia's motion to suppress his Grand Jury testimony. The court's decision is attached hereto in the Appendix, A. 11-15.

ARGUMENT

POINT I

APPELLANT LECLERES WAS DENIED HIS RIGHT OF CONFRONTATION UNDER BRUTON V. UNITED STATES, 391 U.S. 123 (1968) WHEN DEFENDANT GARCIA'S GRAND JURY TESTIMONY WAS INTRODUCED INTO EVIDENCE.

Over objection, the Government was permitted to introduce the grand jury testimony of the Defendant Garcia. Garcia's grand jury testimony was at many points directly contradictory to the testimony tendered by the Government witness, Miriam Rivera. Since Garcia never took the stand in his own behalf, Appellant LeCleres was never given the opportunity to cross examine his co-defendant in order to attempt to reconcile the damaging contradictions. Hence, the admission in this joint trial of Garcia's grand jury testimony was violative of Appellant LeCleres' right of confrontation under the Sixth Amendment despite the court's instruction that such statements were binding only on Garcia.

Bruton v. United States, 391 U.S. 123 (1968); Slaweck v. United States 413 F.2d 957 (8th Cir., 1969); United States v. Bujese, 405 F.2d 888 (2d Cir., 1969); United States v. Cassino, 467 F.2d 610 (2d Cir., 1972).

Garcia's grand jury testimony, for all practical purposes, must be deemed a critical factor assuring the convictions of all the defendants. It would be absurd to say that although LeCleres was not specifically mentioned in this testimony that it did not implicate him since both men were allegedly acting in concert. Moreover, LeCleres should have had the opportunity to cross examine Garcia

regarding whether he knowingly sold a stolen car to Miriam Rivera. This was especially crucial to LeCleres since he was the one who allegedly was responsible for supplying such cars.

Based upon the facts of this case, the violation of Appellant LeCleres' constitutional right of confrontation cannot be deemed harmless error.

POINT II

PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE, RULE 28 (i), ALL RELEVANT ARGUMENTS RAISED IN THE BRIEFS FOR THE CO-DEFENDANTS ARE INCORPORATED BY REFERENCE.

CONCLUSION

FOR THE ABOVE STATED REASONS, APPELLANT LECLERES' CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

January, 1975

RESPECTFULLY SUBMITTED,

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Attorney for Appellant
Manuel LeCleres
180 East 161st Street
Bronx, New York
(212) ME 5-4171

JULIA P. HEIT
of Counsel

US COURT OF APPEALS: SECOND CIRCUIT

USA,

Appellee,

- against -

LE CLERES,

Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

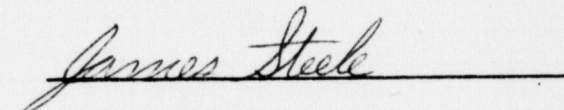
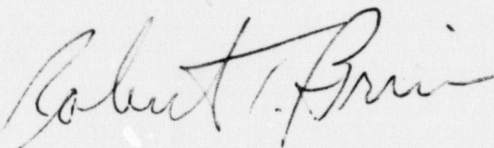
ss.:

I, James Steele, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
250 West 146th, Street, New York, New York
That on the 2nd day of January 1975 at Foley Square, New York

deponent served the annexed Appellant's Brief (Le Cleres) upon

Paul J. Curran
the in this action by delivering ² true ^{is} copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 2nd
day of January 1975


JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975